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Tegas Baiduri Sdn Bhd v BIMB Trust Ltd & Ors

A

HIGH COURT (LABUAN) — NO L22–2 OF 2008–I
DAVID WONG J
14 JUNE 2010

B

Tort — Negligence — Duty of care — Alleged misrepresentations by defendants influenced plaintiff to apply for financing facility — Whether defendants assumed responsibility for what was represented to plaintiff — Whether defendants taken proactive role in procuring facility on behalf of plaintiff — Whether plaintiff relied on advice of defendants — Whether loss suffered by plaintiff reasonably foreseeable — Whether defendants liable for negligence

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The plaintiff was introduced by its property broker to one Dr Aimi Zulhazmi Hj Abdul Rashid ('the second defendant') and one Kariman Abd Jamil ('the third defendant') for the purpose of sourcing finance for the plaintiff's land project in Perak. At all material times the second and third defendants were the chief executive officer and customer relationship manager respectively, of BIMB Trust Ltd ('the first defendant'), a subsidiary of Bank Islam Malaysia Bhd and a member of the Bank Islam Group of Companies. At a meeting arranged between the first and second defendants and the plaintiff's senior manager at the first defendant's premises, the second and third defendants gave a presentation regarding the corporate structure of the first defendant and the financing facilities that the first defendant could provide to the plaintiff. At this first meeting the second and third defendants had also provided a briefing on a financing facility offered by a company called Buckingham Consultants League Sdn Bhd ('BCL'). Thereafter the plaintiff applied for the said financing facility offered by BCL, with all follow-ups in terms of filling in the appropriate forms for the package, and correspondences done through the second and third defendants. An initial payment of RM164,000 to BCL was also done through the second and third defendants. However, there were repeated delays and no progress in the financing facility. Hence the plaintiff commenced the instant action against the defendants for the a sum of RM164,900 and damages suffered as a result of the defendants' negligent and fraudulent representation in respect of the financing facility by BCL. It was the plaintiff's case that it had relied on the advice of the defendants in making the payment of RM164,000 and that the second and third defendants who held themselves to be experts in terms of promoting the financing facility offered by BCL had owed it a duty of care. Thus it was the plaintiff's contention that the defendants had breached the duty of care they owed to the plaintiff and were liable for the loss of RM164,000. The defendants denied the claim and submitted that they owed no duty of care either in contract or tort to the plaintiff in respect of the alleged

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representations. It was the defendants' contention that the first defendant's corporate profile did not state that it was in the business of offering any advice on financial packages or that it was in the business of providing and securing financing packages. The second and third defendants denied assuming responsibility for what was said by them to the plaintiff. Instead they gave evidence that they had specifically informed the plaintiff that the financing facility was offered by BCL and not the first defendant and advised the plaintiff to deal directly with the CEO of BCL. The crux of the defendants' case was that the plaintiff should have checked on BCL and their products and by failing to do so the plaintiff had contributed to its loss.

Held, allowing the plaintiff's claim with costs:

(1) The fact that the parties were introduced to each other by the plaintiff's property broker showed that they were in the business of sourcing finance for clients. As such, based on how the relationship between the defendants and plaintiff started and from the evidence adduced as to what amounted to the alleged misrepresentations it was found that they had assumed responsibility for what they had said and represented to the plaintiff. Further, the second defendant had admitted that there was an agreement between the first defendant and BCL whereby the former stood to gain 1% as commission for successfully introducing customers to BCL. In such circumstances, common sense dictated that since it was in the interest of the defendants to ensure that the deal with BCL was successful, that they had to assume responsibility for their action. Although the second and third defendants' contended that they had orally made clear to the plaintiff that the facility offered by BCL was not their product and that independent investigation should be conducted by the plaintiff, there was no written disclaimer given to the plaintiff to this effect. In any case, the defendants had taken proactive steps in promoting BCL and in the circumstances it was a reasonable inference for the plaintiff to believe that there was no necessity for it to investigate the matter (see paras 4, 14–15, 18 & 35).

(2) The defendants could not seek to exclude liability by relying on the clause in the service agreement because that clause did not apply in cases of gross negligence, such as in the present case (see paras 19–20).

(3) The manner in which the defendants had promoted the facility offered by BCL created a contract between the plaintiff and the first defendant to assist in procuring trade financing facility. Further, the plaintiff had paid a sum of RM20,900 to the first defendant for the services provided (see para 23).

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(4) There was no doubt that the plaintiff had relied on the advice of the defendants in making the payment of RM164,000 and thus the loss of the said sum was reasonably foreseeable if the defendants had breached their duty of care (see para 24).

(5) As the defendants were promoting a product in which they had an interest, they ought to have checked on the background of BCL and its financial package as well as the viability of the said package. However, in the instant case the defendants had failed in their most basic duty of care and were negligent. The defendants' conduct falls under the head of negligence rather than fraud, because the defendants had held an honest view that the financing facility by BCL was not so far-fetched that it was beyond reason (see paras 28–29).

(6) The representations made by the second and third defendants were made in their course of employment. Hence the defendants should be held to be jointly and severally liable for the plaintiff's loss of RM164,000 (see paras 39 & 41(b)).

[Bahasa Malaysia summary

Plaintif diperkenalkan oleh broker hartanahnya kepada seorang yang bernama Dr Aimi Zulhazmi Hj Abdul Rashid ('defendan kedua') dan seorang bernama Kariman Abd Jamil ('defendan ketiga') untuk tujuan memperoleh kewangan untuk projek hartanah plaintif di Perak. Pada kesemua masa material defendan-defendan kedua dan ketiga adalah masing-masing ketua pegawai eksekutif dan pengurus perhubungan pelanggan BIMB Trust Ltd ('defendan pertama'), sebuah subsidiari Bank Islam Malaysia Bhd dan ahli Kumpulan Syarikat Bank Islam. Pada suatu mesyuarat yang diatur di antara defendan pertama dan kedua dan pengurus kanan plaintif di premis defendan pertama, defendan kedua dan ketiga memberikan penyampaian berkaitan dengan struktur korporat defendan pertama dan kemudahan kewangan yang defendan pertama boleh berikan kepada plaintif. Pada mesyuarat pertama defendan kedua dan ketiga juga telah memberikan taklimat mengenai kemudahan kewangan yang ditawarkan oleh syarikat yang dikenali sebagai Buckingham Consultants League Sdn Bhd ('BCL'). Kemudian plaintif memohon untuk kemudahan kewangan tersebut yang ditawarkan oleh BCL, diikuti dengan perkara seperti mengisi borang yang sepatutnya untuk pakej tersebut, dan surat menyurat dilakukan melalui defendan kedua dan ketiga. Bayaran permulaan sebanyak RM164,000 kepada BCL juga dilakukan menerusi defendan kedua dan ketiga. Walau bagaimanapun, terdapat kelewatan yang berulang dan tidak ada perkembangan di dalam kemudahan kewangan tersebut. Oleh demikian plaintif memulakan tindakan ini terhadap defendan-defendan untuk jumlah sebanyak RM164,900 dan kerugian yang dialami disebabkan oleh kecuaian defendan-defendan dan representasi fraud berkaitan dengan kemudahan kewangan BCL. Ia adalah kes plaintif bahawa ia menyandar atas nasihat defendan-defendan dalam membuat bayaran RM164,000 dan bahawa

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defendan kedua dan ketiga yang mengakui diri mereka sebagai pakar dalam mempromosikan kemudahan kewangan yang ditawarkan oleh BCL mempunyai kewajipan berjaga-jaga terhadapnya. Oleh itu plaintif menghujah bahawa defendan-defendan telah melanggar kewajipan berjaga-jaga mereka terhadap plaintif dan oleh itu bertanggungjawab terhadap kerugian RM164,000. Defendan-defendan menafikan tuntutan tersebut dan menghujah bahawa mereka tidak mempunyai kewajipan berjaga-jaga sama ada dalam kontrak atau tort terhadap plaintif berkaitan dengan representasi yang didakwa. Ia adalah hujahan defendan-defendan bahawa profil korporat defendan pertama tidak menyatakan bahawa ia menjalankan perniagaan menawarkan apa-apa nasihat bagi pakej kewangan atau bahawa ia menjalankan perniagaan memberikan dan mendapatkan pakej kewangan. Defendan kedua dan ketiga menafikan bertanggungjawab terhadap apa yang dinyatakan oleh mereka kepada plaintif. Sebaliknya mereka memberikan keterangan bahawa mereka telah memberitahu secara spesifik kepada plaintif bahawa kemudahan kewangan adalah ditawarkan oleh BCL dan bukan defendan pertama dan menasihatkan plaintif untuk berurusan secara langsung dengan KPE BCL. Isu utama kes defendan-defendan adalah bahawa plaintif sepatutnya membuat pemeriksaan mengenai BCL dan produk mereka dan atas kegagalan berbuat demikian plaintif telah menyumbang kepada kerugiannya.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Fakta bahawa pihak-pihak telah diperkenalkan sesama sendiri oleh broker hartanah plaintif menunjukkan bahawa mereka menjalankan perniagaan mendapatkan kewangan untuk pelanggan. Oleh demikian, berdasarkan kepada bagaimana hubungan di antara defendan-defendan dan plaintif bermula dan daripada keterangan yang dikemukakan berkaitan dengan apa yang membawa kepada salah representasi yang didakwa didapati bahawa mereka telah mengambil tanggungjawab terhadap apa yang mereka nyatakan dan representasi kepada plaintif. Selanjutnya, defendan kedua mengakui bahawa terdapat perjanjian di antara defendan pertama dan BCL di mana defendan pertama akan memperoleh keuntungan 1% sebagai komisen jika berjaya memperkenalkan pelanggan kepada BCL. Dalam keadaan sedemikian, akal budi menyatakan bahawa oleh kerana ia adalah dalam kepentingan defendan-defendan untuk memastikan bahawa urusan dengan BCL berjaya, mereka sepatutnya bertanggungjawab bagi tindakan mereka. Walaupun defendan kedua dan ketiga menghujah bahawa mereka telah menjelaskan secara lisan kepada plaintif bahawa kemudahan yang ditawarkan oleh BCL bukanlah produk mereka dan bahawa siasatan bebas sepatutnya dilakukan oleh plaintif, tidak ada penafian bertulis yang diberikan kepada plaintif untuk tujuan tersebut. Walau apa pun, defendan-defendan telah mengambil langkah proaktif dalam mempromosikan BCL dan dalam hal keadaan tersebut ia adalah inferens

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munasabah untuk plaintif mempercayai bahawa tidak ada keperluan untuk membuat menyiasat perkara tersebut (lihat perenggan 4, 14–15, 18 & 35).

(2) Defendan-defendan tidak boleh memohon pengecualian liabiliti dengan bergantung kepada klausa di dalam perjanjian perkhidmatan kerana klausa tersebut tidak beraplikasi di dalam kes kecuaian melampau, seperti di dalam kes ini (lihat perenggan 19–20).

(3) Cara bagaimana defendan-defendan telah mempromosikan kemudahan yang ditawarkan oleh BCL membentuk kontrak di antara plaintif dan defendan pertama untuk membantu dalam memperoleh kemudahan kewangan perniagaan. Seterusnya, plaintif telah membayar jumlah sebanyak RM20,900 kepada defendan pertama untuk perkhidmatan yang diberikan (lihat perenggan 23).

(4) Tidak diragui bahawa plaintif telah bergantung kepada nasihat defendan-defendan dalam membuat bayaran RM164,000 dan oleh itu kerugian jumlah tersebut adalah boleh dijangka secara munasabah jika defendan-defendan memungkiri kewajipan berjaga-jaga mereka (lihat perenggan 24).

(5) Oleh kerana defendan-defendan mempromosikan produk yang di dalamnya mereka mempunyai kepentingan, mereka sewajarnya memeriksa latar belakang BCL dan pakej kewangannya berserta dengan daya maju pakej tersebut. Walau bagaimanapun, di dalam kes ini defendan-defendan telah gagal di dalam kewajipan berjaga-jaga mereka yang paling asas dan cuai. Tindakan defendan-defendan terangkum dalam tajuk kecuaian dan bukan fraud kerana defendan-defendan telah secara jujur mempercayai bahawa kemudahan kewangan oleh BCL bukanlah tidak masuk akal sehingga ia tidak munasabah (lihat perenggan 28–29).

(6) Representasi yang dibuat oleh defendan kedua dan ketiga dibuat semasa mereka masih bekerja. Oleh itu defendan-defendan sewajarnya diputuskan sebagai bertanggungjawab secara bersama dan berasingan bagi kerugian plaintif sebanyak RM164,000 (lihat perenggan 39 & 41(b)).]

Notes

For cases on duty of care, see 12 *Mallal's Digest* (4th Ed 2005 Reissue) paras 963–1011.

Cases referred to

Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301, FC (refd)

Caparo Industries Plc v Dickman [1990] 2 AC 605, HL (refd)

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Donoghue v Stevenson [1932] AC 562, HL (refd)
Foo Fio Na v Dr Soo Fook Mum & Anor [2007] 1 MLJ 593; [2007] AMR 621, FC (refd)
Heaven v Pender (1883) 11 QBD 503, CA (refd)
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465, HL (refd)
Kettlewell v Watson (1882) 21 Ch D 685 (refd)
Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors [2006] 2 MLJ 389; [2006] 2 CLJ 1, FC (refd)
Malaysian International Bankers Bhd v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam [2001] 1 MLJ 375; [2001] 1 CLJ 740, CA (refd)
Maslinda bt Ishak v Mohd Tahir bin Osman & Ors [2009] 6 MLJ 826, CA (refd)
Mutual Life Citizens' Assurance Co Ltd v Evatt [1971] AC 793 (refd)
Panatron Pte Ltd & Anor v Lee Cheow Lee [2001] 3 SLR 405 (refd)
Sim Thong Realty Sdn Bhd v Teh Kim Dar [2003] 3 MLJ 460; [2003] 3 CLJ 227, CA (refd)
Sukatno v Lee Keng See [2009] 3 MLJ 306, CA (refd)
Sutherland Shire Council v Heyman (1985) 157 CLR 424 (refd)
Yeo Tin Sang v Lim Choo Kee [1961] 1 MLJ 23 (refd)

Legislation referred to

Labuan Trust Companies Act 1990

Alex DeSilva (De Silva) for the plaintiff.
Md Tajuddin Md Isa (Mohd Zein Md Tajuddin with him)(Md Tajuddin & Co) for the defendants.

David Wong J:

PROCEEDINGS

[1] The plaintiff's claim is for a sum of RM164,900 and damages suffered as a result of the defendants' negligence and fraudulent representation in respect of an offshore financing transaction by a company named Buckingham Consultant League Sdn Bhd ('Buckingham'). The defendants deny the claim on the ground that they owed no duty of care to the plaintiff in respect of the alleged representations.

BACKGROUND FACTS

[2] The first defendant is a company incorporated under the Labuan Trust Companies Act 1990 and provides, as per its corporate profile, the following services:

(a) the formation and management of company as well as providing corporate secretarial services;

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(b) acting as trustee and custodian in the management of funds;

(c) the setting up of Islamic trust funds;

(d) the writing and custodian services of Islamic will;

(e) administration of estate;

(f) agent for zakat calculation and payment;

(g) provide advisory services for fara'id laws of distribution.

[3] The first defendant is also a subsidiary of Bank Islam Malaysia Berhad and a member of the Bank Islam Group of Companies.

[4] The second defendant and the third defendant are respectively the principal officer and customer relationship manager of the first defendant. Through the the customer relationship manager of the introduction of one Encik Najimi, a property broker, the plaintiff was introduced to the second and third defendant for the purpose of sourcing a loan for a purchase of a property in Ipoh. A meeting was arranged by the property broker with the first and second defendant with the plaintiff's senior manager, Mr Choong Yew Keong — PW1 at the first defendant's office at Suite 8-8, 8th Floor, Sheraton Imperial, Kuala Lumpur. At that meeting where PW1, Encik Najimi, the second and third defendants were present, PW1 was given a briefing on the corporate structure of the first defendant and products available on the market, particularly what was offered by Buckingham. The upshot of the Buckingham package is that Buckingham can source a loan facility of an amount many times more the amount of deposit which the plaintiff is required to be placed with a foreign bank nominated by Buckingham. The interest rate on the credit facility would be more favorable to that of a local credit facility.

ISSUES

[5] From the evidence and submissions from counsel it is my view that the determinative issues in this case are these:

(a) Whether the defendants owed the plaintiff a duty of care either in contract or tort; and

(b) if so, whether the defendants have breached that duty of care.

ISSUE 1: WHETHER THE DEFENDANTS OWED THE PLAINTIFF A DUTY OF CARE EITHER IN CONTRACT OR TORT

Duty of care under tort

[6] Much has been written in the form of judgments of the courts and legal

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journal articles as to when and how a duty of care arises in a relationship between parties. Suffice for me to restate the summary of the principles on this area of the law by the authors of *Charlesworth & Percy on Negligence* (11th Ed). Prior to stating the summary, the learned authors had discussed the history and the development of this area of law since when the principle of law on 'a duty of care' was first stated in 1883 in the case of *Heaven v Pender* (1883) 11 QBD 503 at p 509, where Brett MR stated:

> Where one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise Where one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would have cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger

[7] Since that case we have had the celebrated case of *Donoghue v Stevenson* [1932] AC 562, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and many other cases which the learned authors discussed. At the end of the discussion the learned authors at p 100 summarised as follows:

> The following principles have emerged from the foregoing:
>
> (1) The duty of care is based on either an express or implied assumption of responsibility to exercise reasonable care, when tendering advice and/or providing information;
>
> (2) The elements, which normally are essential, in order to establish the existence of such a duty, are:
>
> (a) The defendant must know that his statement will be communicated to the claimant, either as an individual or as a member of an identifiable class, especially in connection with a particular transaction or transactions of a particular kind;
>
> (b) the defendant must know that claimant will be very likely to rely upon his statement for the purpose of deciding whether or not to enter on the transaction or on a transaction of that kind;
>
> (c) in all circumstances it was reasonable for the recipient to act such advice, opinion or information;
>
> (3) although the duty of care often arises following receipt for advice or information, such a request is not essential: it suffices that advice or information has been volunteered in circumstances where it is foreseeable that the claimant will make some financial commitment based upon its accuracy or truth;
>
> (4) the duty is not restricted to those who carry on a profession. It extends to everyone in trade or business whose occupation either involves or claims to involve the possession of competence and skill in the subject matter concerned; and

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(5) to enable the recipient to sue successfully, he must be able to establish the fact that he relied on the advice, opinion or information to his detriment, thereby suffering economic loss.

[8] Closer to home, Gopal Sri Ram JCA (as he then was) in *Sim Thong Realty Sdn Bhd v Teh Kim Dar* [2003] 3 MLJ 460; [2003] 3 CLJ 227 at p 240 puts it this way:

> If the misrepresentation was made negligently, the remedy of the representee lies in damages in the tort of negligence under the assumption of responsibility and reliance doctrine laid down in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465. In such a case, the representee must plead and prove a special relationship giving rise to a duty of care as well as the other elements that go to constitute the tort of negligence. So far as the relevance of the tort in relation to pre-contractual and contractual statement is concerned, we would quote with approval the following passage from *Sinnadurai on the Law of Contract* (3rd Ed) at p 243:
>
> Under English Law, until the decision of the House of Lords in decision *Hedley Byrne & Co Ltds v Heller and Partners Ltd*, innocent misrepresentation included negligent misrepresentation. However since *Hedley Byrne* and the coming into force of the Misrepresentation Act 1967, there appears now to be a distinction between negligent misrepresentation and innocent misrepresentation. Negligent misrepresentation is generally confined to cases where a duty is imposed to take care in making statement. Such a duty may arise under a contract, where the parties stand in a fiduciary relationship: *Nocton v Lord Ashburton* [1914] AC 932 or out of a 'special relationship': *Hedley Byrne*. Where a special relationship exists, a negligent misstatement may not only be a breach of contractual warranty, but also an actionable tort as a breach of the duty which exists throughout pre-contractual negotiations until making of the final contract. In *Selangor United Rubber Estates Ltd v Cradock & Ors* [1965] Ch 896 the court held that where a plaintiff alleged a breach of duty arising from any given relationship, he has to specify with precision the relationship under which the duty arose: in this case it was not clear whether the plaintiff was alleging the ordinary relationship of banker and customer or some other special relationship.

[9] Steve Shim CJ (Sabah and Sarawak) in *Majlis Perbandaran Ampang Jaya v Steven Phoa Cheng Loon & Ors* [2006] 2 MLJ 389; [2006] 2 CLJ 1:

> Under English law, the general duty of care test enunciated in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 is applicable to all negligence claims, including claims for pure economic loss. Pursuant to this test, three questions have to be addressed, namely, whether the damage suffered by the plaintiff is reasonably foreseeable; whether there is a relationship of proximity between the plaintiff and defendant; and whether it is fair and reasonable that the defendant should owe the plaintiff a duty of care.

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[10] From the above, in my view I am required to ask myself three questions:

(a) Whether the defendants had assumed responsibility for what was said to the plaintiff;

(b) whether the damage suffered by the plaintiff is reasonably foreseeable; and

(c) whether in the circumstances it is fair and reasonable that the defendants should owe a duty of care.

Whether the defendants had assumed responsibility for what was said to the plaintiff

[11] The defendants' contention on this test is premised on the first defendant's corporate profile (pp 156 and 165 of exh B) which does not state that it is in the business of offering any advice on financial packages nor does it state that it is in the business of providing and securing financing packages. The services provided by the first defendant in the corporate profile are set out earlier in my judgment. Apart from the corporate profile, the defendants also rely on the evidence of the second and third defendants who had in essence in their evidence state that they had specifically informed the plaintiff that the Buckingham package is a product of Buckingham and not the first defendant. Further they had warned the plaintiff that it should deal directly with one Vincent Wong the CEO of Buckingham. In a nutshell, the defendants had never assumed responsibility on what was told by them to the plaintiff.

[12] I now weigh those contentions against the evidence of the plaintiff. I start off with the details of how the relationship started and what the alleged misrepresentations are. They are contained in the PW1's witness statement:

Q4: What happened then?

A: En. Najimi informed me that he also knew some people in Bank Islam and that Bank Islam may be able to offer a better loan package. Around mid-March 2006, En. Najimi then arranged for me to meet the 2nd and 3rd Defendant.

Q5: Where did you meet the 2nd and 3rd Defendants?

A: En. Najimi took me to meet the 2nd and 3rd Defendants at the 1st Defendant's business premises at that time situated at Suite 8-8, 8th Floor, Sheraton Imperial, Kuala Lumpur. The meeting took place at a meeting room in the said premises.

Q6: How did the 2nd and 3rd Defendants introduce themselves?

A: The 2nd Defendant, Dr. Aimi Zulhazmi Hj. Abdul Rashid, introduced himself as Principal Offficer of the 1st Defendant and the 3rd Defendant, En. Khariman

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Abd. Jamil introduced himself as the Client Relationship Manager of the 1st Defendant. They both gave me their business cards showing the positions held by them in the 1st Defendant.

Q7: Who was present at this meeting?

A: En. Najimi, the 2nd Defendant, the 3rd Defendant and I.

Q8: What took place at this meeting?

A: The 2nd and 3rd Defendants gave a presentation regarding financing facilities and services that the 1st Defendant could provide to the Plaintiff. The 2nd and 3rd Defendants at this presentation informed me that the 1st Defendant is a subsidiary of Bank Islam Malaysia Berhad and is a member of the Bank Islam Group of Companies and that the 1st Defendant would be able to provide or arrange for financing packages and facilities to the Plaintiff through its agents, associates and business contacts that would best suit the Plaintiff's needs.

Q9: Did the 2nd and 3rd Defendants elaborate or go into details with regards to the mechanisms to obtain the financing package/facility?

A: They informed me that the Plaintiff would be required to appoint the 1st Defendant to set up and form an offshore company in Labuan since Labuan is an international offshore financial centre. The 2nd and 3rd Defendants informed me that once the Plaintiff has formed the company in Labuan, the 1st Defendant would be able to provide or arrange for financial facilities/packages for the Plaintiff on favourable terms. They also told me that the amount of loan or financing would depend on the cash deposit or collateral in the form of property which the Plaintiff was willing to provide. The 2nd and 3rd Defendants informed me that the Plaintiff would be able to get financing up to 7 times the cash deposit or value of collateral provided. They also said that there would be no loan repayment required because under this scheme, 50% of the total loan disbursed would be deposited into an interest gaining account to accumulate compounded interest which will be used to repay the loan. Part of the loan disbursed would also be used to release the collateral provided.

Q10: What did you understand from the presentation as to how the financing package offered was to work?

A: For example, if a loan of USD$20 million is obtained, USD$10 million would be placed in a fixed deposit account where high accumulated compounded interest would be earned. This compounded interest earned by the deposit of USD10million would be used to repay the loan amount of USD20million.In other words, there would be no loan repayment by the Plaintiff. Also, the cash deposit or collateral given initially as security would be released once the loan facility is in place and the loan is released as part of the loan would be used to release the security. The balance of the loan after taking into account the 50% cash deposit, money used to release the security and some finance and administrative charges, would then be released to the Plaintiff ……..

Q10: What happened after this first meeting at the 1st Defendant's offices?

A: Another meeting was held a few days later between the 2nd and 3rd Defendants and my boss, Mr. Lee Fong Nyet, my colleague, Mr. Yong Keong Sheng, En.

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Najimi and myself. I thought it would be best for my boss to come personally and see and hear from the 2nd and 3rd Defendants.

Q15: Where was this meeting held?

A: At the same place in the 1st Defendant's offices at that time situated at Suite 8-8, 8th Floor, Sheraton Imperial, Kuala Lumpur.

Q16: What happened at this meeting?

A: The 2nd and 3rd Defendants went into more details regarding the financing facility/package which the Plaintiff could apply for and explained the whole process mentioned to me before to my boss, Mr. Lee Fong Nyet.

Q17:Did the 2nd and 3rd Defendants make any mention of any further requirements and/or the steps to be taken to enable the 1st Defendant to provide the financing facility/package to the Plaintiff apart from that told to you at the 1st meeting?

A: Yes. The 2nd and 3rd Defendants informed us that apart from setting up an off-shore international company in Labuan, the Plaintiff must also appoint a company as the 1st Defendant's 'funding agent' to facilitate the whole process. The 'funding agent' was a company called Buckingham Consultants League Sdn Bhd.

Q18: Did the 2nd and/or 3rd Defendants provide you with any other information with regards to Buckingham Consultants League Sdn Bhd at this meeting?

A: They informed us that Buckingham Consultants League Sdn Bhd was a 'funding agent' of the 1st Defendant which had extensive business dealings with the 1st Defendant. They also told us that they were confident that Buckingham Consultants League Sdn Bhd had the ability to get the financing package/facility which is most suitable for the Plaintiff. They also told us that the 1st Defendant had previously obtained financing packages/facilities for customers of the 1st Defendant. At the end of this meeting, the 2nd and 3rd Defendants informed us that they would be forwarding some documents for us to go through and get a better idea of what could be offered by the 1st Defendant and Buckingham Consultants League Sdn Bhd.

Q19: Did the Plaintiff receive any documents from the Defendants?

A: On 7.4.2006, I received 2 e-mails from the 3rd Defendant from his office e- mail address. The e-mails contained attachments of information with regards to the financing facilities as well as a flow chart ….

Q49: After payments were made, did you follow up with the 2nd Defendant or the 3rd Defendant?

A: Yes. I kept questioning the 2nd and 3rd Defendants many times on the status of the application on the financing package facility which was supposed to be offered to the Plaintiff.

Q50:What did they tell you?

A: They told me that the application process would roughly take about 4 to 6

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weeks. After more pressure from me to meet someone from Buckingham Consultants League Sdn Bhd, they said they would arrange for a meeting with Vincent Wong, the principal.

Q51:Did the meeting take place?

A: Yes, around middle June 2006. The 3rd Defendant arranged for a meeting between himself, the 2nd Defendant, Vincent Wong, my boss, Mr. Lee Fong Nyet, En. Najimi and myself at PJ Hilton.

Q52:What happened at this meeting?

A: The 2nd and 3rd Defendants and Vincent Wong informed us that the Plaintiff would have to wait for approximately 6 to 8 weeks for the application to be processed. They told us to be patient and reassured us that everything was in place but would take some time before the loan could be released.

Q53:What happened after this meeting?

A: After the passing of about 6 weeks after making the payments, I kept following up and pestering the 2nd and 3rd Defendants as to the status of the loan. Then, a second meeting was arranged by the 2nd and 3rd Defendants with Vincent Wong sometime late June/early July 2006 at Chili's Restaurant, Bangsar Shopping Complex, Kuala Lumpur.

Q54:Who were present at this meeting?

A: The 2nd and 3rd Defendants, Vincent Wong, En. Najimi, my Boss, Mr. Lee Fong Nyet and myself.

Q55:What happened at this meeting?

A: The 2nd and 3rd Defendants and Vincent Wong informed us that the Plaintiff's application is in the process and that the delay is due to the control of currency and movement of funds especially in USD currency as a result of the September 11 incident. Vincent Wong as well as the 2nd and 3rd Defendants said that it was more difficult to move funds around especially in USD and asked the Plaintiff to be patient.

Q56: What happened after this meeting?

A: There were several other meetings between the 2nd and 3rd Defendants and my boss and I regarding the loan. I kept pressuring the 2nd and 3rd Defendants for updates on the status and I expressed my fears to them that this transaction would not go through.

Q57: Did the 2nd and 3rd Defendants do anything to reassure you about the transactions?

A: Sometime on or about 12.7.2006, the 3rd Defendant sent me a fax from Bank Islam. The 3rd Defendant told me that this was a Letter of Offer of a similar loan transaction that was done by the 2nd and 3rd Defendants in the 1st Defendant. He told me that this was proof that the transaction was genuine and that the Plaintiff just had to be patient and everything would fall into place.

Q58: Please refer to pages 9 to 12 of the Bundle of Disputed Documents [Volume 2]. Is this the document?

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A: Yes

Q59: What happened after that?

A: Then on or about 5.10.2006, during the Ramadhan month, another 3 meeting was set up at Holiday Inn, Glenmarie. This meeting was a buka puasa event which was attended by the 2nd and 3rd Defendants, my boss, Mr. Lee Fong Nyet and myself.

Q60: Did Vincent Wong attend this meeting?

A: No. He was initially supposed to attend this meeting but we were informed by the 2nd and the 3rd Defendants that he had something up at the last minute and 9 could not attend.

Q61:What happened at this meeting?

A: The 2nd and 3rd Defendants assured us that the Plaintiff's application was still being processed. However, the 2nd Defendant explained that the loan amount would have to be reduced from the USD$40 million that the Plaintiff applied for to about USD$20 million. He explained the mechanics of how the loan was going to be structured by writing down some figures on a piece of paper. Please see page 13 of the Bundle of Disputed Documents [Volume 2]. He explained that our collateral was worth RM10.2 million which at that time was equivalent to USD$2.83 million. Based on that, he explained that our application based on 7 times the value of our collateral would give us the figure of around USD$20,214,286.However, he said that they are reducing the loan amount to only 5 times the value of the collateral which comes up to about USD$14,438,775. However, he said that the Letter of Offer would state the amount as USD$28,877,551. Half of that amount, USD$14,438,775 would be placed in a fixed deposit account to gain interest to repay the loan. This would mean that there would be a disbursement of USD$14,438,775 to the Plaintiff. He further said that this figure would then be reduced by USD$2,830,000, which is the value of the collateral. This amount he said would be deposited into a fixed deposit account so that the collateral could be discharged. This would leave a balance of USD$11,608,775. He said that the bank would deduct 7% from the USD$28,877,551.00 which would be USD$2,021,428. This would leave a sum of USD$9,587,347 to be released for the Plaintiff, which at that time was equivalent to RM34,514,449.

Q62: Please refer to page 13 of the Bundle of Disputed Documents [Volume 2]. What is this note?

A: This is the handwritten note written by the 2nd Defendant himself regarding the amount of the Loan as well as the mechanism as to how the loan facility works at this meeting held on or about 5.10.2006.

Q63:What happened after this meeting?

A: I kept on pestering the 2nd and 3rd Defendants regarding the loan application and its status.

Q64:Did anything happen upon you making the said enquiries?

A: Yes. On or about 13.10.2009 I received an SMS from the 3rd Defendant

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informing me that he had received a Letter of Offer and told me to meet him at his office to collect the said letter. I went to the 3rd Defendant's office and collected a letter from the 3rd Defendant who gave me a letter from bank called Overseas Trust Bank Limited dated 13.10.2006 which was addressed to Tegas Corporation International Ltd offering a loan of USD 28,877,511.00. This incidentally is the exact same figure that the 2nd Defendant told us would be given to the Plaintiff in our meeting on or about 5.10.2006.

Q65: Refer to pages 128 to 133 of the Bundle of Agreed Documents Part 2. Is this the letter dated 13.10.2006?

A: Yes

[13] There is no dispute that what was described by PW1 was how the relationship was formed between the defendants and the plaintiff. In a capsule this is what happened:

(a) The plaintiff was introduced by its broker to the second and third defendants for the purpose of sourcing finance for their land project in Perak. The fact that one Encik Najimi introduced the plaintiff to the defendants shows that the first and second defendants had made known to Encik Najimi that they are in the business of sourcing finance for clients.

(b) At the meeting in mid March 2006 at the first defendant's office, the first and second defendants had introduced themselves as senior officers of the first defendant and had made known to the plaintiff that the first defendant was part of the Bank Islam Group of Companies. The second defendant's CV speaks for itself. He is the chief executive officer of the first defendant and holds a PhD in Islamic Wealth Management. As for the third defendant, he holds a doctorate degree as well and is the customer relationship manager.

(c) Also at the first meeting the first and second defendants gave a briefing on a financing facility called a CD program which was offered by Buckingham and was given a corporate profile and brochure of the first defendant. The corporate profile is in exh B. Suffices for me to just quote a few snippets from there:

At p 157, exh B:

CLIENT- FOCUSED

Our experience, resources and qualified professionals enable us to help you understand the fortune and challenges of wealth, as well as to cleverly identify the opportunities it creates:"

PERPETUITY AND RELIABILITY

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A With solid financial backup from the Bank Islam Malaysia Group, BTL has a solid footing in the financial market for 3 years as a Trust Corporation, becoming trustee for major corporate issues. For the Individuals, continuity"

DYNAMISM

B With primarily young and enthusiastic personnel, you can be assured that continuous consultation is part of the many services offered by BTL in line with expertise and technical assistance".

At p 159, exh B:

C Welcome to BIMB Trust Limited, As a member of the Bank Islam Group of Companies, the company stands upon a strong foundation of experience and reputable trust, especially with the support of our holding company - BIMB Holdings Berhad, listed on the Main Board of Bursa Malaysia.

D At p 161, exh B:

BIMB Trust Limited (BTL) pioneers in the development of wealth management that is resourceful, strategic, and above all, effective. Operating within the Labuan International Offshore Financial Centre (IOFC), BTL provides a platform of solutions that require constructive proficiency in
E offshore company incorporation, offshore asset protection and preservation, as well as offshore investments.

(d) All follow ups in terms of filling in the appropriate forms for the Buckingham package, correspondences, be it telephone, SMS messages
F and emails, with the plaintiff were done through the second and third defendants.

(e) Payments of the RM164,000 were done through the second and third defendants

G (f) The second and third defendants had after the initial payment of RM164,000 continued to press the plaintiff to pay USD200,000 to the Buckingham so that the facility can be set up.

H **[14]** From the above I have no hesitation in finding that the defendants had assumed responsibility for what they had said and represented and my conclusion is further confirmed by the defendants' own conducts which are these. Firstly the defendants had through the evidence of the second defendant admitted that they had an agreement with Buckingham and this is how it was
I put (p 59 NOP – Q38):

38. Does the 1st defendant obtain any benefit by introducing Buckingham to any of its customers?

Yes, if the deal is successful on the disbursement the 1st defendant may receive a percentage - 1% as commission.

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[15] Common sense dictates that since it was in the interest of the defendants to ensure that so to speak 'the deal is done', they must assume responsibility for their actions.

[16] Secondly, the standard answer of 'I don't know' by the third defendant when cross examined' on the various SMS messages between him and PW1 speaks volume or rather lack of the credibility of the third defendant.

[17] Thirdly, the promotion and acceptance of the 'Golden package' by the defendants and plaintiff respectively again speaks volume. Here the plaintiff had paid a sum of RM20,900 for that package. I can do no better than quote what Lord Devlin said in *Hedley Byrne*:

> I think therefore, that there is ample authority to justify Your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the word of Lord Shaw in *Nocton v Lord Ashburton* [1914] AC 932, 972 are equivalent to contract', that is where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and tha the informer of adviser knows that it is … I shall therefore content myself with the proposition that wherever there is a relationship 'equivalent to contract', there is a duty to care. Such a relationship may be either general of particular.

[18] In respect of the contention that the second and third defendants had orally made clear to the plaintiff that the Buckingham is not their product and independent investigation should be conducted by the plaintiff flies in the face of the undisputed evidence. It is not reasonable for a company such as the first defendant being part of a big conglomerate family of Bank Islam that they would not have given a written disclaimer to the plaintiff as to the Buckingham package if they are minded to give any disclaimer. With the legal resource at their disposal, any legal adviser worth his or her salt would have advised that a written disclaimer as opposed to oral disclaimer must be given. However the reality is that no such written disclaimer was given and the reason could very well be that if such disclaimer was given they would not attract any clients to the Buckingham schemes. As stated earlier the conduct of the defendants was not one of a 'post office' role. On contrary the first defendant through the actions of second and third defendants had taken a proactive role in procuring the deal for Buckingham.

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[19] It is also contended that under the 'Golden package' there is a declaimer clause in the service agreement (pp 89 of exh B) which reads as follows:

> 3 Exclusion of Liability:
>
> 3.1 Except in the case of gross negligence or breach of this Agreement or memorandum and articles of association of the company, neither BTL nor the Nominees shall be liable to the Principal in respect of anything done or omitted or declined to be done by them.

[20] But as pointed out by counsel for the plaintiff and agreed by me, that clause does not apply for the simple reason that it does not cover 'gross negligence' which in this case which I will point out later that there had been gross negligence on the part of the defendants.

[21] Counsel for the defendants had also referred to the case of *Mutual Life Citizens' Assurance Co Ltd v Evatt* [1971] AC 793 where the Privy Council held that a duty of care would only arise if the defendant is in the circumstances business of giving advice or information on the matter sought by the plaintiff, or who professes to have expertise in a particular field. Counsel for the defendants referred me to the words of the Privy Council:

> since the company's business did not include giving advice on investments and it did not claim to have the necessary skill and competence to give such advice and to exercise the necessary diligence to give reliable advice, its duty towards the plaintiff was merely to given him an honest answer to his inquiry and accordingly, the fact alleged did not disclose a cause of action

[22] Relying on that quotation and the fact that the first defendant's corporate profile did not include giving advice on financing package, counsel contends no duty arises. With respect, this contention ignores the evidence that the plaintiff had signed up for the golden package which included assistance in getting trade financing, the evidence that the defendants had held out themselves by their conducts to be expert on the field of offshore financing and the proactive manner in which they promoted the product.

Duty of care under contract

[23] Though counsel for the plaintiff in his submission had not specifically dealt with the contractual duty of the defendants, he had referred to the 'Golden package' which the plaintiff took up included the service of 'assistance in getting trade financing facility' and the manner the defendants had promoted the product which in my view created a contract between the plaintiff and the first defendant to assist in procuring trade financing facility. My reason is simply that the plaintiff had paid a sum of RM20,900 to the first

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defendant for the services provided for in the 'Golden package' which as stated earlier included 'assistance in getting trade financing facility'. The defendants' contractual duties to the plaintiff are similar to that discussed in my deliberation on tortuous duties. Hence there is no necessity for me to discuss them further.

ISSUE 2: WHETHER THE DAMAGE SUFFERED BY THE PLAINTIFF IS REASONABLY FORESEEABLE?

[24] The loss or damage of RM164,900 is made up as follows:

(a) Payment to the first defendant for the setting up of two offshore companies — RM20,900 — 17 May 2006.

(b) Part payment to Buckingham for processing of the offshore facility — RM90,000 — 15 May 2006.

(c) Balance payment to Buckingham for processing of the offshore facility — RM54,000 — 2 June 2006.

[25] There is also no doubt in my mind that the plaintiff had relied on the advice of the defendants in making the payment of RM164,000 as at the time of payment, Mr Vincent Wong had not made his appearance yet. To recap, all payments were made prior to the meeting with Mr Vincent Wong in mid June 2006. There is also no doubt in my mind that the loss of RM164,000 is reasonably foreseeable if the defendants had breached their duty of care which I now deal with. Having held themselves as expert in terms of sourcing off shore loans by promoting the product of Buckingham, the defendants are duty bound to say the very least to check on the legitimacy of Buckingham and the personnel behind it. It is in evidence that No 18 investigation had been carried out on Buckingham, Mr Vincent Wong or Overseas Trust Bank Ltd prior to promoting Buckingham product. The question which confronts me is whether there should be such an investigation.

Standard of care

[26] This question concerns 'the standard of care' which the defendants should be subjected to. Generally speaking, the defendants are required to exercise reasonable care and skill in giving advice and what is 'reasonable' is determined by the court by taking into account what is the standard of care and skill which can be demanded from a person of similar profession of the second and third defendants (*Foo Fio Na v Dr Soo Fook Mum & Anor* [2007] 1 MLJ 593; [2007] AMR 621). In this case there is no evidence from the plaintiff as what that standard of the defendants should be subjected to. Be that as it may, the court is duty bound to prescribe a standard of care and in this case it is my

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view that when promoting a product in which one has an interest in as the defendants have in this case, the least the defendants should have done is to check on the background of the Buckingham and financial package. In this case, investigation should have done on Buckingham, Mr Vincent Wong, Overseas Trust Bank Ltd and the viability of the package offered. Of course what had happened is that the Buckingham package had turned out to be a scam and the plaintiff had paid a heavy price. Overseas Trust Bank Ltd appears to be non-existent and Mr Vincent Wong has since disappeared from the face of the earth which resulted in a police report lodged by the defendants themselves against Mr Vincent Wong. As for the viability of the package — a credit facility amount which is seven times more than the deposited amount — the defendants should have investigated that such facility is legitimate and common in offshore credit facility market. The defendants had failed miserably in their most basic duty of care. In *Malaysian International Bankers Bhd v Lembaga Bersekutu Pemegang Amanah Pengajian Tinggi Islam* [2001] 1 MLJ 375; [2001] 1 CLJ 740 where the facts are similar to this case, the Court of Appeal through the judgment of Shaik Daud Ismail JCA held as follows:

> In the light of the position of the appellant as merchant bankers, it is our view that they cannot be heard to say that they are merely playing the role of a finder of bumiputra purchasers of the shares of the company and that whatever information they supplied to the appellant were simply passed on from the company. It is our view that being merchant bankers, they owe a higher duty to the respondent than that of a mere finder. They certainly owe a higher burden when supplying any information from the company to the respondent. They ought to ascertain and verify all information supplied by the company before passing on to the respondent. We agree that the first representation was actually made as it is contained in the letter from Mohamad Tajuddin to Tan Sri Abdul Aziz but we cannot agree that it was not false. The representation that the directors of the company guaranteed a dividend of 24%pa for three years was indeed a false one, as found by the learned judge.

[27] The defendants here had in fact taken a 'could care less attitudes' and 'sealing the deal' mindset that in my view had led to the plaintiff in claiming that the defendants had been fraudulent. In *Kettlewell v Watson* (1882) 21 Ch D 685 at 706 Fry J had said:

> Fraud imports design and purpose, negligence imports you are acting carelessly and without that design

[28] In my view the defendants' conducts fall under the head of negligence rather than fraud. As pointed out correctly by counsel for the defendants, PW1 in his evidence during cross-examination had conceded that he thought that the Buckingham package as presented to him was logical. So it can be said that the defendants did not hold the view that the Buckingham package was unworkable. That said, it does not mean that they had no duty to check

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independently that this sort of packages is common in the offshore loan market. I am aware of the reliance of the case of *Panatron Pte Ltd & Anor v Lee Cheow Lee* [2001] 3 SLR 405 where the Court of Appeal of Singapore held as follows:

> The law as regards fraudulent representation is clear and settled. A man can be held liable in tort to another, if he knowingly or recklessly makes a false statement to that other with intent that it would be acted upon, and that does not act upon it and suffers damage. The plaintiff must prove actual fraud which happens when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

[29] In my view the defendants had not been reckless in so far as the Buckingham package is concerned for the simple reason that both the plaintiff and the defendants held an honest view that the financing package by Buckingham is not so far fetch that it is beyond reason. As such the plaintiff had not proved this fraudulent conduct beyond reasonable doubt as required by law (see *Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301).

ISSUE 3: WHETHER IN THE CIRCUMSTANCES IT IS FAIR AND REASONABLE THAT THE DEFENDANTS SHOULD OWE A DUTY OF CARE

[30] Counsel for the defendants has urged me to pay heed to the so called 'increment test' expounded by Brennan J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481 which was approved by Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 618 and it is this:

> It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable 'considerations which ought to negative, or reduce or limit the scope of the duty or the class of person to whom it is owed'.

[31] I have no problem with what is stated by Brennan J but one must take into consideration that we live in a borderless economy where the financial status of a country can be changed for the worse overnight with negative commentaries by the so called experts on financial matters. Similarly the currency of a country can be attacked resulting in devastating consequence to the people of that country. That being the case, it is only reasonable that the public expect full disclosures by the so called financial advisers to their clients to be practiced so that they can make informed decisions as to their course of action. Another consideration which I need to take into account is this. Not to impose such a duty would in my view undermine the integrity and confidence

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of the finance industry which is the one of the driving engines of the country's economy. An undermined finance industry will damage the country image as a trusted international financial centre which is being actively promoted to the international community by the relevant authorities. Hence in this case, I have no hesitation in concluding that in the circumstances of this case, it is fair to hold that the defendants owe a duty of care of investigation as set out earlier to the plaintiff. In any event, I believe that I had not expanded a new category of negligence as all I did was to apply established principles in this area of law.

OTHER CONTENTIONS

Maybank Bhd had caused the loss

[32] This contention is premised on the fact that the plaintiff had paid Buckingham with two Maybank cheques with the name 'Buckingham Consultants 'League' Sdn Bhd, written on them and that that company does not exist in law. The entity which exists in the registry of companies is Buckingham Consultants 'League' Sdn Bhd. Hence, it is submitted that it was Maybank who had caused the loss by clearing the cheques. Firstly it is not disputed that the third defendant had explained to the PW1 that the difference in names is only a minor discrepancy caused by the differences in spelling in British English and American English. That only means that the defendants had led the plaintiff to believe that this issue is a non-issue. Furthermore the two relevant cheques were handed over to the third defendant for onward transmission to Buckingham. In any event I agree with counsel for the plaintiff that there is no evidence that Maybank did not have an account in the name of Buckingham Consultants League Sdn Bhd or Buckingham Consultants League Sdn Bhd or both. The reality is that the two cheques were written up based on the representation that Buckingham is legitimate entity. Accordingly I reject this contention.

The plaintiff's contributory negligence

[33] The crux of the submission of counsel for the defendants is simply that the plaintiff should have checked on Buckingham and their products and by failing to do so; they had contributed to the loss. Counsel also referred the court to the case of *Sukatno v Lee Keng See* [2009] 3 MLJ 306 at p 323 where the Court of Appeal said:

> What is required of the defendant in order to establish a plea of contributory negligence is rather easy. It is for the defendant to prove that the plaintiff did not in his own interest take reasonable care of himself and thus contributed by his own want of care to his own injury (*Nance v British Columbia Electric Railway Company*).

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[34] The facts which the defendants rely on for this contention are these:

(a) The plaintiff through PW1 admitted that offshore financing is new to the plaintiff; hence the plaintiff should have done independent investigation.

(b) Payments were made to Buckingham without making an effort to trace their office which is alleged to be near the plaintiff's office.

[35] With respect this ignores the basic and primary reason why the plaintiff met up in the office of the first defendant. That reason is that the plaintiff being an entity involved in development of lands went to the office of the first defendant on the sole premise that the defendants could help them as they held themselves as the 'people' who could help. Further even after the payment of the RM164,900 the defendants had continued to urge the plaintiff to pay the US$200,000 to Buckingham. As stated earlier the defendants had taken quite pro active steps in promoting the Buckingham package and in the circumstances it is a reasonable inference for me to draw that the plaintiff was led to believe that there is no necessity on its part to investigate bearing in mind, among other factors listed earlier, that first defendant is part of the financial family conglomerate of Bank Islam.

[36] Accordingly I reject the defendants' contention of contributory negligence.

Liability of the first defendant

[37] Though this issue was not dealt with by counsel in their submissions, out of caution I should say something about it. As discussed throughout my judgment, the second and third defendants in making the representations to the plaintiff had been acting as employees of the first defendant which in my view gives rise to the issue of whether the first defendant is vicariously liable for the negligent acts of the second and third defendants. This issue was discussed in the case of *Yeo Tin Sang v Lim Choo Kee* [1961] 1 MLJ 23 where the then Court of Appeal through the oral judgment of Thompson CJ said this:

> For myself I will start my consideration of this appeal by quoting the following decision from an old edition of Bowstead on Agency [1944 (10th Ed) p 206.]:
>
> Where injury or loss is caused to a third person by the wrongful act … of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent.
>
> I accept that as a correct statement of the law.

[38] This principle of law is followed in the recent Court of Appeal decision in the case of *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* [2009] 6 MLJ

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826 where the court was also faced with the same issue of vicarious liability. Through the judgment of Suriyadi JCA, the Court of Appeal quoted with approval the judgments in *Dyer v Munday* (1895) (CA) where:

> Lord Esher MR ruled:
>
> The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.
>
> Lopes LJ remarked:
>
> The law says that for all acts done by a servant in the conduct of his employment, and furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded.

[39] From those quotations, I am required to determine whether what the second and third defendants represented to the plaintiff was in the course of their employment. In my mind there is no doubt that what the first and second defendants had done was in the course of their employment. Hence the defendants should be held to be jointly and severally liable for the plaintiff's loss.

[40] Before I make the final order let me say that this judgment had been purposely delayed so that I can deliver it and another judgment in a related case, namely L22–6 Of 2007, on the same day. That case was heard after this case and had also concerned the three defendants in this case and has quite similar facts as here. The only difference is the plaintiff who was one Dato' Zamzuri bin Abdul Ghaffar.

FINAL ORDERS

[41] For all the reasons stated above I make the following orders:

(a) A declaration that at all material times the second and third defendants were acting as employees of the first defendant in its dealings with the plaintiff.

(b) That the first, second and third defendants shall jointly and severally pay to the plaintiff:

  (i) A sum of RM164,900;

  (ii) interest at the rate of 4%pa on the judgment sum from the date of this writ until the date of judgment;

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(iii) thereafter interest at the rate of 8%pa on the judgment sum from the date of judgment until the full realisation of judgment sum; and

(iv) costs to be taxed unless agreed to the plaintiff.

[42] I have not given an order for damages to be assessed as I am of the view that the only foreseeable loss which the plaintiff had suffered is the sum of RM164,000. In any event there is no evidence before me to show there is any other loss which I could conclude that they are foreseeable.

Plaintiff's claim allowed with costs.

Reported by Kohila Nesan